

ODEI “Lowdown” – The True Facts or Relevant Information



SUBJECT: Federal Sector Alternative Dispute Resolution

APPLICABILITY: Applicants for, or employees in, Title 5 and Title 32 technician status

How does the ADR process work?

The revised regulations do not require federal agencies to conduct ADR in every EEO case; rather, agencies have the discretion as to which EEO cases are offered ADR. Complainants may not file a new complaint based on the agency's refusal to offer ADR in their particular case.

If the agency offers ADR during the pre-complaint, or the informal, stage of the EEO process, the complainant may choose between participating in the ADR program or the traditional EEO counseling activities. Once the complainant elects to participate in the ADR program, all EEO counseling activities will end. It is also important to note that electing ADR increases the EEO pre-complaint processing period from 30 to 90 days. In the event that the matter concludes without resolution after 90 days, the agency will conduct a final interview, and issue a notice of right to file a formal complaint to the complainant.

If the complainant files a complaint, the agency may also choose to offer ADR during the formal complaint stage. The 180-day processing period for the formal complaint stage may be increased by an additional 90 days in order to conduct ADR, if the parties agree to do so in writing.

The revised regulations have established certain core principles which must be incorporated into every federal sector ADR program. The overriding requirement is that the ADR program is fair. Fairness requires voluntariness, neutrality, confidentiality, and enforceability.

1. Voluntariness means that the parties (in this context, the complainant and the agency) knowingly and willingly enter into an ADR proceeding and that they have the opportunity to end the proceeding at any time. In this regard, once the ADR proceeding ends, complainants may re-enter the traditional EEO complaint process in order to pursue their claim. Moreover, any agreements between the parties must have been reached without coercion or duress.
2. Neutrality means that the ADR proceeding is impartial and independent of control by either party. A neutral third party who assists the parties in reaching an agreement must not have any stake in the outcome of the proceeding.
3. Confidentiality of the ADR proceedings must be maintained by the parties and the neutral third party. This means that information concerning the underlying facts of an ADR proceeding and records generated as part of that proceeding may not be made part of the EEO complaint record. The Alternative Dispute Resolution Act of 1996, 5 U.S.C. § 574, provides that neutrals in ADR proceedings may not voluntarily disclose or be required to disclose dispute resolution communications, with certain statutory exceptions. For additional information regarding confidentiality, please consult with the guidance developed by the Department of Justice Interagency Alternative Dispute Resolution Working Group at <https://www.adr.gov/>
4. In order to have an enforceable settlement agreement, the agreement must be in writing and signed by both parties. The revised regulations at [29 C.F.R. § 1614.504](#) set forth specific procedures by which the EEOC enforces all settlement agreements.

Nothing said or done during attempts to resolve the matter through ADR proceedings may be made the subject of an EEO complaint. All concerns with the operation of the agency's ADR program should be resolved by contacting the administrator of the ADR program. If the agency's ADR program appears to conflict with the EEOC's complaint processing regulations and the MD-110, individuals may email federalsectoreeo@eeoc.gov or write to:

Assistant Director, Special Operations Division, Federal Sector Programs
U.S. Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

ADR Questions and Answers

I understand that all agencies are required to have an ADR program available in the EEO process. Does this mean that an agency must offer ADR in every case?

No. Agencies are not required to offer ADR in every case. There may be cases where ADR is not appropriate or feasible.

When will an agency offer ADR?

Agencies may be flexible in designing their ADR programs to fit their environment and workforce. The offer may be made either at the pre-complaint phase of the process, or after the formal complaint has been filed. In this regard, agencies have the discretion to determine whether a given dispute is appropriate for ADR. Agencies may decide to offer ADR on a case-by-case basis, by issue, and/or by geographic location. However, agencies may not decline to offer ADR because of the bases involved in a particular case (i.e., race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, genetic information, or retaliation).

Can an employee file a complaint against an agency if it refuses to offer ADR in a particular case?

No. An agency's decision not to offer ADR for a particular case cannot be made the subject of an EEO complaint.

Can an employee who has elected ADR withdraw from the process?

Yes. The ADR process is voluntary and the aggrieved party can withdraw at any time.

Can the EEO Counselor be a "neutral" in the ADR program?

The EEOC discourages, but does not prohibit, EEO Counselors from acting as neutrals in ADR programs. This is due, in part, to the EEOC's concern that a complainant may be confused as to the role being played by the Counselor (e.g., is the Counselor/neutral engaged in informal resolution, or is this an ADR process in which a strict standard of confidentiality will apply?). If an agency chooses to have its EEO Counselors serve as neutrals, EEOC has stated clearly that the EEO Counselors may not serve as neutrals in a dispute for which they have provided counseling.

If ADR fails, what is the role of the EEO Counselor?

Should ADR fail to resolve the matter, the case is referred back to the EEO Counselor for the issuance of a notice of final interview. No further informal resolution efforts should be made by the EEO Counselor.

Can agencies utilize binding arbitration as an ADR technique under Part 1614?

No. ADR programs cannot diminish an individual's right to pursue his or her claim under the 1614 process. Binding arbitration is not an appropriate ADR technique in the EEO process because it would require an individual to waive his/her right to a hearing or to appeal the matter to the EEOC. This requirement, however, does not prevent agencies from using binding arbitration in their grievance process.

I understand that ADR is a confidential process. What exactly does this mean?

If a party tells the neutral something in private and asks the neutral to keep the matter confidential, the neutral is bound by law not to disclose this information voluntarily. There are some exceptions to this rule. For example, if a party confesses to the commission of a criminal offense, or to an act of fraud, waste, or abuse, or that the party plans to commit a violent physical act, the neutral may be required to share this information with appropriate authorities. If a judge determines that disclosure of private confidential discussions is necessary to prevent a manifest injustice, establish a violation of law, or prevent harm to the public health or safety, the neutral may be required by a court to disclose the private discussions.

Are settlement agreements confidential?

No. Neither the ADRA nor MD-110 require settlement agreements to be confidential. Even when the parties specifically agree to keep the terms of their settlement agreement confidential, the details of the resolution must still be given to specific offices with a need to have that information, such as those offices which will implement the settlement.

What role does the responsible management official have in ADR?

Once the agency has determined that a matter is appropriate for ADR, it can decide who should represent the agency and can require the responsible management official (RMO), or the agency official directly involved in the case, to cooperate in the ADR process.

SCNG ODEI Contact Information

If you are a Federal Employee or job applicant and believe, you have been subjected to unlawful discrimination, harassment or retaliation on the basis of **race, color, religion, national origin, genetic information, sex, (including pregnancy, gender identity, sexual orientation), age (40 and over), or disability, contact the Office of Diversity, Equity, and Inclusion.**

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